

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly denied appellant's request for an oral hearing before an OWCP hearing representative as untimely filed under 5 U.S.C. § 8124.

FACTUAL HISTORY

On September 29, 2016 appellant, then a 57-year-old school janitor, filed a traumatic injury claim (Form CA-1) alleging that, on September 25, 2016, he pulled his left arm/shoulder while in the performance of his federal employment duties. He explained that he was attempting to change a tire on home Living Vehicle #1 when the jack gave out. Appellant did not indicate on the claim form that he had stopped work.

In an October 13, 2016 development letter, OWCP noted no documentation had been received with his claim. It requested that appellant submit evidence in support of his claim, including a physician's opinion supported by a medical explanation as to how the reported work incident caused or aggravated a medical condition.

OWCP thereafter received progress notes from Dr. Dana Robert Johnson, a specialist in occupational medicine, dating from September 29, 2016. In an October 12, 2016 report, Dr. Johnson related appellant's history of the September 25 2016 incident, and a diagnosis of left shoulder arthritis. He indicated that appellant's employment incident, as well as preexisting causes, contributed to this diagnosis.

By decision dated November 21, 2016, OWCP denied appellant's claim, finding that the medical evidence submitted was insufficient to establish that the diagnosed condition was causally related to the accepted September 25, 2016 employment incident.

On an appeal request form dated March 28, 2017, and postmarked March 29, 2017, appellant requested a telephonic hearing before an OWCP hearing representative.

Appellant continued to submit progress notes from Dr. Johnson, as well as diagnostic reports.

By decision dated August 16, 2017, OWCP's Branch of Hearings and Review denied appellant's hearing request as untimely filed. OWCP's hearing representative noted that OWCP had issued its decision on November 21, 2016, while appellant's hearing request was postmarked March 29, 2017, more than 30 days after OWCP's decision. He found that appellant was not entitled to a hearing as a matter of right, as the request was submitted more than 30 days after OWCP's decision. The hearing representative also considered whether to grant appellant a discretionary hearing, but determined that the issue in this case could equally well be addressed by a request for reconsideration before OWCP and submitting evidence not previously considered.

LEGAL PRECEDENT

Section 8124(b)(1) of FECA, concerning a claimant's entitlement to a hearing before an OWCP hearing representative, provides: Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of

this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his or her claim before a representative of the Secretary.³

A hearing is a review of an adverse decision by an OWCP's hearing representative. Initially, the claimant can choose between two formats: an oral hearing or a review of the written record. In addition to the evidence of record, the claimant may submit new evidence to the hearing representative.⁴ A request for either an oral hearing or a review of the written record must be sent, in writing, within 30 days of the date of the decision for which the hearing is sought.⁵ A claimant is not entitled to a hearing or a review of the written record if the request is not made within 30 days of the date of the decision.⁶

OWCP has discretion to grant or deny a request that is made after the 30-day period for requesting an oral hearing or review of the written record. In such a case, it will so advise the claimant with reasons.⁷

ANALYSIS

The Board finds that OWCP properly determined that appellant's request for an oral hearing was untimely filed. OWCP's regulations provide that the hearing request must be sent within 30 days of the date of the decision for which a hearing is sought. Because appellant's request was postmarked March 29, 2017, more than 30 days after OWCP's November 21, 2016 decision, it was untimely and he was not entitled to an oral hearing as a matter of right.

Although appellant's request for an oral hearing was untimely, OWCP has the discretionary authority to grant the request and it must exercise such discretion.⁸ OWCP's hearing representative properly exercised his discretion in denying appellant's hearing request as the issue of whether appellant established that the diagnosed shoulder condition was causally related to the accepted September 25, 2016 employment incident could be equally well addressed by a request for reconsideration before OWCP. The Board finds that the hearing representative properly exercised his discretionary authority in denying appellant's request for a hearing.⁹ The only limitation on OWCP's authority is reasonableness. An abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to

³ *Id.* at § 8124(b)(1).

⁴ 20 C.F.R. § 10.615.

⁵ *G.W.*, Docket No. 10-0782 (issued April 23, 2010); *James Smith*, 53 ECAB 188 (2001); *Id.* at § 10.616(a).

⁶ *See S.M.*, Docket No. 17-1876 (issued January 24, 2018); *R.T.*, Docket No. 08-0408 (issued December 16, 2008).

⁷ *G.W.*, *supra* note 5.

⁸ *R.V.*, Docket No. 17-1286 (issued December 5, 2017).

⁹ *Mary B. Moss*, 40 ECAB 640, 647 (1989). Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from known facts. *See André Thyratron*, 54 ECAB 257, 261 (2002).

both logic and probable deductions from established facts.¹⁰ In this case, the evidence of record does not establish that OWCP abused its discretion in denying appellant's request for a hearing. Accordingly, the Board finds that OWCP properly denied appellant's hearing request.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for an oral hearing before an OWCP hearing representative as untimely filed pursuant to 5 U.S.C. § 8124.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 16, 2017 is affirmed.

Issued: May 18, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

¹⁰ *Samuel R. Johnson*, 51 ECAB 612 (2000).